IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 6.12.2004.

CORAM:

THE HONOURABLE MR.JUSTICE V.KANAGARAJ

CRIMINAL APPEAL NO.1283 OF 2004.

P.Balakrishnan .. Appellant/Complainant

Vs.

R.Gnanasekaran ... Respondent/Accused

Appeal filed under Section 378 of the Criminal Procedure Code as against the judgment dated 10.9.2004 made in C.C.No.261 of 2003 by the Court of Judicial Magistrate, Thiruchengode.

For appellant : Mr.B.Singaravelu
For respondent : No Appearance

* * *

JUDGMENT

The above appeal is directed against the judgment dated 10.9.2004 made in C.C.No.261 of 2003 by the Court of Judicial Magistrate, Thiruchengode.

2. Today, when the above matter has been taken up for consideration, the learned counsel for the appellant would file a memo. thereby submitting that the cover in which the private notice was sent by RPAD had been returned to the sender and in spite of the information of the registered post having been sent, the respondent did not receive the same and would file the returned cover into Court. In the above circumstances, the service is held `sufficient'. Since the respondent is also called absent, this Court is left with no choice but to decide the above appeal on materials made available on record and upon hearing the learned counsel for the appellant.

3. Tracing the history of the case, it comes to be known that the appellant herein has filed a private complaint against the respondent herein for the offence punishable under Section 138 of the Negotiable Instruments Act before the Court

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below and the same having been dismissed for non-prosecution, he has come forward to prefer the above appeal on certain grounds as brought forth in the grounds of appeal.

4. On a perusal of the materials placed on record and upon hearing the learned counsel for the appellant, this Court is of the view that such an order cannot be passed in law, particularly in view of the fact that a definite judgment has been rendered by the Apex Court reported in AIR 1998 S.C. 596 (ASSOCIATED CEMENT CO. LTD., vs. KESHVANAND), wherein the Apex Court has given the Code that is to be followed by the Courts in the following manner.

> "Reading the Section in its entirety would reveal that two constraints are imposed on the Court for exercising the power under the Section. First is, if the Court thinks that in a situation it is proper to adjourn the hearing then the Magistrate shall not acquit the accused. Second is, when the Magistrate considers that personal attendance of the complainant is not necessary on that day, the Magistrate has the power to dispense with his attendance and proceed with the case. When the Court notices that the complainant is absent on a particular day the Court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourned the Court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must, therefore, be exercised judicially and fairly without impairing the cause of administration of criminal justice."

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5. In spite of the law being such, the attitude exhibited on the part of the complainant is also not fair. Since the complaint is of the year 2003 and already one year has lapsed, no more delay committed on either side could be tolerated particularly on the part of the complainant, who has come forward to file the complaint seeking redressal and remedy. However, this Court is of the view that one more opportunity could be

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given for the complainant to prosecute the matter in the manner known to law without any default and taking such steps effectively and without loss of time.

6. For all the discussions held above, the above appeal deserves to be allowed, for a decision to be made by the lower Court on merits and in accordance with law.

In result,

i) the above criminal appeal succeeds and the same is allowed.

ii) The Judicial Magistrate, Thiruchengode is hereby directed to take up C.C.No.261 of 2003 on file and with due notice to the parties, shall continue the trial and decide the matter on merits and in accordance with law.

gr.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1.The Judicial Magistrate, Thiruchengode.

2. -do- thro' The Chief Judicial Magistrate, Namakkal

+ 1 cc to Mr.B.Singaravelu, Advocate SR No.53452

Judgment in Criminal
Appeal No.1283 of 2004

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SR

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